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IN THE

Supreme Court of the United States

October Term, 1984

Dr. Charles McDaniel, et al.,
Petitioners,

v.

Georgia Association of Retarded Citizens, et al.,
Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

MOTION TO APPEAL AS AMICI CURIAE AND BRIEF OF AMICI CURIAE NATIONAL SCHOOL BOARDS ASSOCIATION AND NATIONAL ASSOCIATION OF SECONDARY SCHOOL PRINCIPALS

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Motion of National School Boards Association and National Association of Secondary School Principals for Leave to File Brief as Amici Curiae

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The National School Boards Association and National Association of Secondary School Principals move this Court for leave to participate as amici curiae herein for the purpose of filing the attached brief. Petitioners have consented to the filing of this brief.

The National School Boards Association is a nonprofit federation of state public

school boards associations, which represent local school boards having responsibility for the education of more than ninety-five percent of this nation's school children.

Every school district in the country receives, or is eligible to receive, financial assistance under the Education for All Handicapped Children Act of 1975, 20 U.S.C. Section 1401 **et seq.** (the Act).

The decision below will have a substantial effect on the content, financing and administration of the educational program of every school district in the country. It is, therefore, of great importance to the full understanding of the implications of this action, that the Court herein be fully apprised of the nature of education programs throughout the country and the potential effects of such a decision on those programs.

A 1981 study commissioned by the U.S. Department of Education, The Cost of Special Education, conducted by the Rand Corporation, found that the cost of educating handicapped children is 2.17 times greater than the cost of educating a non-handicapped child. An education for a severely retarded child cost, in 1977-78, an average of $5926 annually. The cost of educating handicapped children is twice that of that "average" child, with costs for educating handicapped children and youths rising at a rate twice that of instructional or operating budgets. Few school districts presently operate year-round programs for handicapped children. Therefore, the cost increases, over those noted above, that would be necessitated by the decision below could be substantial.

As the decision in this case will have an impact on school districts throughout

the country, the National School Boards Association and the National Association of Secondary School Principals urge this Court to grant leave to present their views.

Respectfully submitted,

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BRIEF OF AMICI CURIAE NATIONAL SCHOOL BOARDS ASSOCIATION AND NATIONAL ASSOCIATION OF SECONDARY SCHOOL PRINCIPALS

INTEREST OF THE AMICI CURIAE

Amicus curiae, National School Boards Association is a nonprofit federation of this nation's state public school boards

associations, the District of Columbia school board and the school boards of offshore flag areas of the United States. It is organized to promote the general advancement of education, to encourage the most efficient and effective organization and administration of the public schools, and to preserve the unique American tradition of local lay control of schools, with education policy decisions rendered by those directly accountable to the public through the elective or appointive process. Established in 1940, the National School Boards Association is the only major educational organization representing school boards and their members. Its membership is responsible for the education of more than ninety-five percent of this nation's public school children.

The individuals who make up this nation's school boards are predominantly elected or appointed lay community representatives, responsible under state law for the fiscal management, staffing, continuity and educational productivity of the public schools within their jurisdictions. The National School Boards Association submits this brief in the belief that decisions such as the one below threaten the ability of the nation's school boards to effectively educate all the students entrusted to their care by eroding significantly the authority of states and school boards to make educational determinations based upon local and state fiscal and administrative concerns.

Amicus curiae National Association of Secondary School Principals (NASSP) is a

voluntary association of approximately 35,000 administrators of public and private secondary schools throughout the United States. These men and women are directly responsible for the education of some 20 million American youth attending schools in 16,000 school districts. NASSP customarily does not intervene in private litigation. Its interest in this case stems from its strong conviction that the issues presented here are of urgent importance both to all of its members and to public education generally.

Passage of the Education for All Handicapped Children Act of 1975 was widely acclaimed and strongly supported by nearly all elements of the professional education community. However, by 1978, it had already become apparent that the Congress of the United States had no intention of funding education for the handicapped at

anything near the level of additional cost and effort which the law, as interpreted by the Executive Branch, would require. In addition, professional advocacy groups were turning to the federal courts in a continuous effort to expand the scope of the Act and the costs of meeting its requirements. These developments forced sympathetic educational groups, like the National Association of Secondary School Principals, to express concern by adopting at its 1978 national convention a resolution which stated:

> NASSP reaffirms its long-standing commitment to handicapped children and youth to the end that participation in quality educational experiences will enable them to attain their full potential. At the same time, in order to achieve the objectives of P.L. 94-142, NASSP recommends that the federal government insure financial support commensurate with that required of the states and local school districts.

The Association takes a dim view of

any and all federal programs which mandate certain services while leaving the funding burden to states and municipalities least able to afford them.

Since 1978, Congress has actually decreased its financial support for education programs and the Executive Branch has sought even deeper cuts in the level of support. Efforts to expand the scope of coverage of the Act through judicial interpretation have continued unabated, however. The case at bar represents just one more such attempt, and amici object on the basis that such interpretations, absent the financial support needed to meet them, are fundamentally unfair.

REASONS FOR GRANTING THE WRIT

1. The lower Court exceeded its authority under the Supreme Court's decision in **Board of Education of Hendrick Hudson**

School District v. Rowley, 458 U.S. 176 (1982), by substituting its own view of the best educational methodology for that of the State by requiring a restructuring of the "traditional" school year to have summer programs available for handicapped children regardless of whether such programs are otherwise available.

2. Even assuming that the services required by the lower court to be provided, are "appropriate", the cost of meeting those requirements is so excessive as to be unreasonable under the standard set in Rowley, supra.

ARGUMENT

The decision of the lower court does not involve a simple judicial

interpretation of a statute defining the student services to be provided by Georgia school districts which receive federal funding for handicapped children. To the contrary, the precedent set by this decision and others such as **Scanlon v. Battle**, 629 F.2d 269 (3d Cir. 1980), cert. denied, 452 U.S. 968 (1981), affects every school district in the country and could result in a major revision of the very nature of the public educational system.

The potential financial impact on public education of this case is significant. The National School Boards Association estimates that it could cost more than an additional one billion dollars more annually to educate the country's handicapped children if the lower court's decision is allowed to stand. This

estimate was made on the basis of the statistical information in the U.S. Department of Education's Report to Congress: "To Assure the Free Appropriate Public Education for All Handicapped Children," 1982. The average annual cost per handicapped child ($3794) divided by the number of school days per year (180) yields a cost of $21 per day per handicapped child. In 1982, 4,177,689 handicapped children were "counted" for purposes of P.L. 94-142. Out of this number 844,180 were "mentally retarded," and 348,954 were emotionally disturbed;" thus, a total of 1,193,134 million children would likely fall into the Respondent's class. We did not include over 1,468,014 "learning disabled" children in our computation. It would cost approximately $840 per handicapped child to provide

summer programs of 40 days. That figure multiplied by 1,193,134 million children produces a total national annual expenditure of over a billion dollars. That amount would be increased depending on the number of additional days required (i.e., weekends and holidays in addition to summers) and on the extent the average daily expenditures are increased because of support personnel costs -- administration, bus drivers, cafeteria workers, janitors, etc.

This Court has recognized that financial exigencies are a relevant consideration for courts in determining whether a duty exists to provide a particular service. **Board of Education of the Hendrick Hudson Central School District v. Rowley**, 458 U.S. 176 (1982). The lower

court, however, discounts the financial consequences of their decision. It is true that the decision as to whether to provide an extended school year to a particular child is made on an individual basis and not on the basis of the membership of the child in a particular classification of handicapped children. However, in planning state and local education budgets, state legislatures and local school boards will have to assure that every member of the class of handicapped children for which a longer education period potentially would be "appropriate" will be counted in the total budget. Thus a state might be able to meet the mandate of the court but in so doing would have to cut back the remainder of the educational program so as to exclude many other needy students.

This Court noted in **Pennhurst State School and Hospital v. Halderman**, 451 U.S. 1, 101 S. Ct. 1531 (1981), that the Act in question there was passed by the Congress pursuant to its Spending Power rather than under §5 of the Fourteenth Amendment. Thus,

> the legitimacy of the Congress' power to legislate ... rests on whether the State voluntarily and knowingly accepts the terms of the 'contract' .... There can, of course, be no knowing acceptance if a State is unaware of the conditions or is unable to ascertain what is expected of it. Accordingly, if Congress intends to impose a condition on the grant of federal moneys, it must do so unambiguously. 101 S. Ct. at 1539-40.

When the State of Georgia and the school districts therein accepted funding under P.L. 94-142 (also passed under the Spending Power) they did not knowingly

accept a requirement that local school districts must incur the expense of providing a full summer school education to handicapped children even though the schools would not otherwise be open.

In addition to the financial impact, decisions such as the Eleventh Circuit's threaten to erode state and local decision-making authority in education. The court's decision exceeds the requirement that the school district provide "meaningful access" to handicapped children. **Rowley**, supra. This Court held in **Rowley**, that a court's inquiry in suits brought under the Handicapped Act is twofold: "First, has the State complied with the procedures set forth in the Act; and second, is the individualized educational program developed through the

Act's procedures reasonably calculated to enable the child to receive educational benefits?" The district court in the case at bar held that both criteria had been met, but exceeded its authority by inserting its own views on the merits of a nine-month education program. **Georgia Association of Retarded Citizens v. McDaniel**, 511 F. Supp. 1263, 1266, 1268 and 1282 (1981).

The lower court's statement that "the nine month school year is a tradition of only recent vintage", **Georgia Association of Retarded Citizens v. McDaniel**, 716 F.2d 1565 (11th Cir., 1983) is not true. Regardless of the merits of the "tradition" it has been a policy of almost universal application in this country since colonial days. Hermansen & Gove The Year-Round

School 45-15; Shepard and Baker, Year-Round Schools; The Encyclopedia of Education, McMillan and Free Press, at page 597. Whether this policy is good or bad or obsolete, as apparently the lower court thinks it is, is irrelevant to the legal issues in this case. As this Court held in **Rowley,** supra courts must "avoid imposing their view of preferable educational methods upon the states."

By requiring the state to make potentially large expenditures on the basis of a judicial assessment of the educational desirability of year round programs, the court seeks to change the very nature of the public school system. At present, the public school system is designed only to provide equal access to all children. If public education is to be required to

redesign that system so as to meet all the needs of only one classification of children to the exclusion of others -- that requirement should come from a higher source than a U.S. Circuit Court.

Education, as has been noted by this Court on several occasions, is a state function, **Milliken v. Bradley**, 418 U.S. 717 (1974); **San Antonio ISD v. Rodriguez**, 411 U.S.1 (1973). The state determines first, whether it will provide a free education to its youth and second, who will provide that education. The state makes that first decision on the basis of the financial resources available and the various needs of the student population. The length of the school year is not just an arbitrary state local policy; it defines the parameters of the education program which the state is agreeing to provide to

its school age children. Within those parameters some children may be provided more services and some less services according to their individual needs -- but the length of the school year identifies tne nature of the educational program, not merely the type of services to be provided to individual students.

Some states operate summer educational programs for certain handicapped children. Some states do not. Some local school systems provide summer educational programs through federal funding or other means. Most do not. But the issue here is whether every school district in the country, every state in the country, must operate a summer educational program and provide services during that summer program to those handicapped children for whom such a program is deemed "appropriate."

Local school systems receive their funding from three sources: local property taxes, federal funding and state funding. State funding is based upon a formula computed as a dollar amount times the average number of children enrolled in the school district during the school year. The school year is set by the state at a prescribed number of days, based on the total amount. In most states the number of school days is set at 180. That does not mean the district may not hold school for a longer period, but the district will receive no state money for any period longer than 180 days.

Although the number of school days set is not scientific or based upon an educational table of learning, it is also not arbitrary. The state legislature has determined through the very complex budgetary process that it has a certain

amount of funds to devote to education. It then determines that it has sufficient funds to provide an education to all of its public school children for a period of 180 days. That 180 day period, therefore, is the period set for all public education in the state. Deviations from that period must be funded through other sources.

The court below is bypassing the orderly political and budgetary process of the state to restructure the educational program of the state and either require the state to extend its education program and fund local school districts for that extended period or to require the local school district to come up with the additional funding itself through bond issues or some other illusory method.

One other unfortunate result of the decision is the potential increase in the

number of requests for due process hearings under the Act. School districts will be in the position of either offering a summer program for every handicapped child who is more than minimally handicapped or providing a due process hearing which itself is costly in both dollars and staff time.

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